

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 318 OF 1991**

Kallappa Yallappa Ghodake,
age 74 years, Occupation
Agriculturist, Residing
At Gram Panchayat House
No.45, Hannur Taluka
Akkalkot, Dist: Solapur

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)... Appellant
(Original Plaintiff)

Versus

Maruti Vithoba Ghodke,
age 50 years, Occupation
Agriculture, Resident of
Hannur, Taluka Akkalkot,
District : Solapur.

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)... Respondent
(Original Defendant)

Ms. S.M. Dandekar Advocate for Appellant

*Mr. A.P. Kulkarni for Mr. A.A. Kumbhakoni, Advocate for
Respondent*

**CORAM : S.R.SATHE, J.
DATED : 07th JULY, 2006**

ORAL JUDGEMENT :-

1. Appellant the original plaintiff has preferred this appeal against the judgement and order passed by the Court of IIIrd Additional District Judge, Solapur in Civil Appeal No.58 of 1986, whereby, the order passed by the Trial Court dismissing Plaintiff's suit for declaration and injunction was confirmed and the appeal was dismissed and cross objections were allowed and it was held that plaintiff was not in possession of the suit house on the date of the suit. For the sake of convenience hereafter the parties

shall be referred to as '*Plaintiff*' and '*defendant*'.

2. The brief facts giving rise to this appeal are as under :-

The suit lands bearing Survey No.10/2 of which block Number is 15 and Survey No.32/1 of which block number is 73, situated at village Hannur, Taluka : Akkalkot and house property bearing Grampanchayat No.45 were originally owned by deceased Rama Yallappa Ghodke. The present Plaintiff is the brother of the deceased Rama. During the old age of Rama and his wife Sidhhavva, they were looked after by the Plaintiff. On 07/06/1969, Rama executed a Will whereby he gave his above mentioned suit property to his wife Sidhhavva and created limited interest in her favour by stating that she should enjoy the said property and take income out of the same during her life time and after her death, the property should go to Rama's brother Kallapa i.e. present plaintiff.

3. It is Plaintiff's case that Rama executed power of attorney in his favour on 25/07/1970 and handed over the possession of the suit property to him. Even after the death of Rama, Plaintiff continued to be in possession of suit property. He, however, used to give income out of the same to Sidhhavva. According to Plaintiff, with a view to deprive him from the suit property, defendant gave his son in adoption to Sidhhavva. Not only that but thereafter, the

said adopted son and Sidhhavva filed a suit for permanent injunction against the present Plaintiff. However, the said suit was dismissed. Thereafter, the defendant took Sidhhavva to Akkalkot and got the Sale Deed of the suit property executed in his favour on 21/10/1980. It is Plaintiff's case that the said Sale Deed is Sham and bogus and defendant did not receive possession of the suit property under the Sale Deed.

4. Sidhhavva died on 23/11/1980. Thus according to Plaintiff, by virtue of the Will executed by Rama he became full owner of the suit property. However, on 03/12/1980, the defendant obstructed Plaintiff's possession of the suit lands. Hence on 02/03/1981, Plaintiff filed Regular Civil Suit No.20/1981 in the Court of Civil Judge, Akkalkot for declaration that the Sale Deed dated 21/10/1980 got executed from Sidhhavva is void and for permanent injunction restraining defendant from obstructing the Plaintiff's possession of the suit property.

5. The defendant filed his Written Statement at Exh-13 and opposed the interim application as well as the suit. The defendant contended that the alleged Will dated 07/06/1969 is not legal and valid and the same is not binding on him. According to him, as Sidhhavva adopted his son, he has become the owner of the suit property. The defendant also contended that Plaintiff was not at all in

possession of the suit property and decree passed in Regular Civil Suit No.7 of 1977 is not binding on him. He also contended that the suit property has been purchased by him under the Sale Deed and thus he has become the owner of the same. He also contended that as Sidhhavva adopted his son, he ought to have been made party to the present suit. Hence, on all these grounds, the defendant prayed for dismissal of the suit.

6. On these pleadings, the learned trial Judge framed issues at Exh-56. In order to prove the suit claim, the Plaintiff examined himself at Exh-69 and 3 other witnesses namely Ramchandra Tippanna Khandekar, attesting witness to the Will in question, PW-3 Sangawwa Bhimsha Ghodke Exh-71 and witness Shetiba Vithoba Bansode Exh-72. As against this, the defendant examined himself at Exh-74 and attested witness to the Sale Deed namely Avadut Khandoba Pujari Exh-77 and witness Dhondiba Eknath Sathe Exh-78.

7. After considering the oral and documentary evidence of both the parties, the learned trial judge came to the conclusion that though in the Will executed by Rama, it was mentioned that Sidhhavva was to get income of the suit property during her life time and after her death, the property would go to Plaintiff, the property was given to Sidhhavva for her pre-existing right and as such by virtue of provision of section 14(1) of the Hindu Succession Act,

1956, she had become full owner of the suit property and the case of the Plaintiff that he has become the owner by virtue of Will dated 07/06/1969 is not correct. The trial court also held that the Sale Deed executed by Sidhhavva in favour of defendant is not null and void. He also held that the lands were not in possession of the Plaintiff on the date of the suit. Naturally, the trial court dismissed the Plaintiff's suit.

8. Being aggrieved by the said judgement and order, the Plaintiff filed Regular Civil Appeal No.58 of 1996. After hearing the arguments of both the learned advocates, the First Appellate Court came to the conclusion that Sidhhavva has become the full owner of the suit property and as such she was entitled to dispose of the suit property. The First Appellate Court also held that the findings recorded by the trial court are legal and correct in respect of the suit lands. The learned First Appellate Judge also found that findings recorded by learned Judge holding that the suit house is in possession of the Plaintiff is not correct. He therefore dismissed the appeal and allowed the cross-objections.

9. The above mentioned order is challenged in the present second appeal. From the perusal of the record, it appears that while admitting this appeal on 02/07/1991, this Court has passed the following order.

"Admit. Substantial question of law as framed in ground Nos. 2,3,4 & 5."

The said grounds are as follows:-

(2) That the substantial question of law arises in this Appeal, is whether Sidhhavva, widow of Rama Yallappa Ghodke had any right to sell the suit properties to the Respondent-defendant by Sale Deed dated 21/10/1980, when Rama had executed a Will dated 07/08/1969 giving Sidhhavva his wife the right to enjoy the suit property till her life time, after which all the suit properties were bequeathed to the Appellant-plaintiff having regards to the provisions of Section 14(2) of the Hindu Succession Act, 1956, which specifically states that nothing contained in sub-section (1) of section 14 of the said Act, shall apply to the property acquired under a Will, which prescribed a restricted estate in such property.

(3) That another substantial question arises in this Appeal, is whether Sidhhavva Yallappa Ghodke had acquired full title on the basis of the Will executed by her late husband Rama on 07/06/1969, having regards

to the provisions of Section 14(1) of the said Act and whether the said Section 14(1) is applicable to the facts of the present case.

(4) That the other substantial question of law that arises in this Second Appeal is, Whether the decision recorded in Regular Civil Suit No.7 of 1977 will act as res judicata wherein limited interest in suit properties are given to the deceased Sidhhavvabai.

(5) That the other substantial question that arises is whether the issue regarding limited ownership in the suit properties of the deceased Sidhhavva which had been decided in R.C.S. No.7 of 1977 between the same parties while answering issue No.8 will operate as res judicata under section 11 of the Civil Procedure Code in the present litigation.

10. In this appeal before me, Smt. Dandekar learned advocate for the Plaintiff has urged only two points. Firstly, she submitted that the Courts below have not properly construed the Will dated 07/06/1969 and wrongly

held that Sidhhavva had become the full owner of the property as per the provisions of section 14(1) of Hindu Succession Act, 1956. Secondly, she canvassed before me that in earlier suit which was filed by Sidhhavva against the present Plaintiff i.e. Regular Civil Suit No. 7 of 1977, it was held that Sidhhavva was having only life interest in the suit property and she was limited owner and the said finding operates as rest-judicata. She further submitted that findings recorded by the Courts below that Sidhhavva was full owner and entitled to dispose of the property are not legal and correct and as such the appeal be allowed and Plaintiff's suit for declaration and injunction be decreed in his favour.

11. As against this, learned advocate for the defendant supported the judgement and order passed by the Courts below. He submitted that the present case squarely falls under section 14(1) of Hindu Succession Act, 1956 and as such the appeal be dismissed.

12. It is not in dispute that the suit properties were owned by deceased Rama. From the evidence on record, it is also clearly established that Rama has executed a Will dated 07/06/1969 Exh-97. It is true that in the said Will Exh-97, it is clearly mentioned that after the death of Rama, his wife Sidhhavva would take the suit property in her possession and also take income out of the same during

her life time and after her death, Rama's brother Kallapa i.e. present Plaintiff would get the property. It is the case of Plaintiff that by virtue of above mentioned stipulation in the Will, Sidhhavva had limited interest in the suit property and after her death, he become the owner of the said property. As against this, it is the contention of the defendant that by virtue of provisions of section 14 (1) of Hindu Succession Act, 1956, though it was mentioned in the Will that Sidhhavva would get the property during her life time, she had in fact become the full owner thereof, because whatever was given to her was for her pre-existing right of maintenance.

13. Thus, the fate of this appeal depends on the question as to whether the present case falls under section 14(1) or 14(2) of the Hindu Succession Act, 1956. In order to decide this question properly, it would be worthwhile to see the relevant section. It runs as follows :-

Section 14(1) : Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation:- In this sub-section, 'property' includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a

partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

Section-14(2): Nothing contained in sub-section (1) shall apply to any property acquire by way of gift or under a Will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

14. It is needless to say that Sidhhavva being legally wedded wife of deceased Rama, she had right of maintenance over Rama's property i.e. suit property. It is nobody's case that some other provision was made for her maintenance. So, under such circumstances, whatever property was given to Sidhhavva in Will dated 07/06/1969 was in respect of her pre-existing rights. The learned

advocate for the Plaintiff submitted that even if it is assumed that Sidhhavva had right of maintenance and she was entitled to use the income of the suit property during her life time still from the wording of the Will wherein it is stated that after her death Plaintiff would get the property, it must be held that the provisions of section 14 (2) of Hindu Succession are applicable in the instant case. For this proposition, she has placed reliance on a case **Vankamamidi Venkata Subba Rao, Appellant V/s. Chatlapalli Seetharamaratna Ranganayakamma, Respondent AIR 1997 Supreme Court 3082**. I have carefully gone through the said ruling. The facts of the said case and the facts of the case in hand are quite different. In that case, the widow obtained property from her husband, prior to Act, in recognition of her pre-existing right of maintenance. In subsequent document relating to the said property, the widow acknowledged that what she obtained was limited right with provision that property would revert to her son. So under such peculiar circumstances of the case, it was held that provisions of section 14(2) are applicable and her right would not be enlarged into absolute estate. However, in the instant case, the properties given to her are for her pre-existing right of maintenance. Moreover, there is no such admission of the widow as it was in the above cited case that she has taken the property as limited estate. On the contrary, in the present case, Sidhhavva averred that she is the full owner of the suit property. Not only that but

she also averred that in her capacity as full owner she executed the sale deed of the said property in favour of defendant. So, the ratio of the above cited ruling is of no use to Plaintiff.

15. The learned advocate for the Plaintiff has also drawn my attention to the case **Dayasingh V/s. Dhankumar, AIR 1974 Supreme Court 665**. However, the facts of the said case are totally different from the facts of the present case. In that case, a Hindu widow governed by customary law of Punjab who succeeded to the estate of her husband in 1933 died after the coming into force of the Hindu Succession Act but was not then in possession of the estate. It was held that Succession to the estate would be governed by section 8 of the Act and not by the customary law of Punjab which was enforced at the time of her husband's death. Here in the instant case, we are mainly concerned with the interpretation of the Will in question and the issue as to whether interest that was created in favour of Sidhhavva was for her pre-existing right of maintenance. Moreover, in the instant case, admittedly, Sidhhavva was in possession of the suit property after the death of Rama. Though feeble attempt has been made on the part of Plaintiff to show that he was in actual possession by virtue of power of attorney executed by Rama in his favour, from the readings of the said power of attorney Exh-99, it is quite evident that Plaintiff was only asked

to look after the property for and on behalf of Rama. So, in the eyes of law, it can not be said that Plaintiff was put in possession of the said property. Even after the death of Rama, Sidhhavva was in actual possession. So, the above cited case would not help the present Plaintiff.

16. As against this, the learned advocate for the defendant has placed reliance on several cases such as :-

<i>Sr. No.</i>	<i>Citations</i>	<i>Case Name</i>
1	(2005)5 SCC 390	Shakuntala Devi V/s. Kamala and ors.
2	(2001)8 SCC 552	Palchuri Hanumayamma (Smt) V/s. Tadikamalla Kotlingam
3	(1996)8 SCC 525	C. Masilamani Mudaliar and ors. V/s. Idol of Sr. Swaminathaswami and Ors.
4	(2000)6 SCC 310	Balwant Kaur and Ors. V/s. Chanan Singh and Ors.
5	(2000)6 SCC 325	Pt. Madan Swaroop Shrotiya Public Charitabl Trust V/s. State of U.P. and Ors.
6	1995(1) MLJ 367	Nathu S/o. Bakaram Nimkar and Ors. V/s. Yamunabai @ Gunabai wd/o. Bakaram Nimkar & anr.

17. In the first case cited above, while elaborating the scope of section 14(1) of Hindu Succession Act, 1956.

The Apex Court has observed:-

“ It may be useful to note the interpretation placed on Sections 14(1) and 14(2) of the Hindu Succession Act, 1956 in V. Tulsamma V/s. Sesha Reddy, (1977) 3 SCC 99, at p.140, para 69:

The ambit of section 14(2) of the Hindu Succession Act, 1956 “must be confined to cases where property is acquired by a female Hindu for the first time as a grant without any pre-existing right, under a gift, will instrument, decree, order or award, the terms of which prescribe a restricted estate in the property.... Where, however, property is acquired by a Hindu female at a partition or in lieu of right of maintenance, it is in virtue of a pre-existing right and such an acquisition would not be within the scope and ambit of (Section 14(2)), even if the instrument, decree, order or award allotting the property prescribes a restricted estate in the property.”

Thus, even though in the present case, U had inherited the limited interest in question under the Will of her husband, since it was bequeathed for her maintenance, it was a pre-existing right and therefore did not fall within the ambit of section 14 (2), and

hence was enlarged to an absolute right by virtue of section 14 (1).

18. In fact, in a case Masilamani Mudaliar and ors. V/s. Idol of Sri Swaminathaswami Thirukoil and Ors. (1996) 8 Supreme Court Cases 525 it has been observed that :-

“ the properties given to the wife by the husband under his Will for maintenance must be construed to have been acquired by the wife, in view of her pre-existing right to maintenance. When properties are thus bequeathed for their enjoyment in life, it can not be said to be a right acquired for the first time under Will but it has to be considered as a reflection of the pre-existing right. After 1956, her limited right got enlarged into absolute right by operation of Section 14 (1) of the said Act. She will have to be treated as having become an absolute owner.”

19. This above mentioned view is also endorsed by the Apex Court in a case Bhoomireddy Chenna Reddy and another, Appellants V/s. Bhoospallipeda Verrapa (dead) by lrs. and another, Respondent (1997) 10 SCC 673 wherein also Their Lordship observed that property bequeathed to wife by

husband under a Will with right to enjoyment during life must be construed to have been acquired by the wife in view of her pre-existing right to maintenance. Bearing in mind the above proposition of law if we consider the entire evidence on record then it must be held that though in the Will dated 07/06/1969 executed by Rama, it was mentioned Sidhhavva would enjoy or take the income of the suit property during her life. The same was in fact for her pre-existing right and as such by virtue of the said Will she has in fact become the full or absolute owner of the suit property. Both the Courts below have therefore rightly concluded that deceased Sidhhava was full owner and she had right to sell the suit property under the Sale Deed dated 21/10/1980 to the defendant.

20. It was argued on behalf of the defendant that Sidhhavva and her adopted son had filed Regular Civil Suit No.7 of 1977 against the present Plaintiff Kallappa for permanent injunction and in that suit it was held that Sidhhavva is having limited interest in the property till her death and as such the present Plaintiff was restrained from entering the suit land and disturbing Sidhhavva's possession. It was therefore submitted that the said finding operates as res judicata and now it can not be said that Sidhhavva had become absolute owner. The certified copy of the judgement in Regular Civil Suit No.7 of 1977 is on record. From the perusal of the same, it very clear that

no specific issue with regard to Sidhhavva becoming absolute owner by virtue of section 14 (1) of Hindu Succession Act, 1956 was raised and decided in the said suit. So in such circumstances merely while considering the question as to whether present Plaintiff can permanently be restrained from obstructing possession of Sidhhava and her adopted son, Court observed in the said suit that perpetual injunction can not be issued against the present Plaintiff but he can be restrained from entering in the suit land till death of Sidhhavva. So, considering this position, it can not be said that the present suit is barred by principle of res judicata.

21. Though it is alleged by the Plaintiff that the Sale Deed executed by Sidhhavva in favour of defendant on 21/10/1980 is sham and bogus and without consideration, the Plaintiff has failed to adduce any evidence worth the names to show that said Sale Deed was without consideration. Though fraud was alleged by the Plaintiff, he failed to give any details of the same and adduce any evidence in that behalf. Naturally, both the Courts below rightly negatived the Plaintiff's case in that behalf and finally held that Plaintiff is not entitled for declaration and injunction as prayed.

22. The findings recorded by the Courts below are legal and correct. There is no reason to interfere with the same.

23. In this view of the matter, the appeal is dismissed with costs.

(S.R.SATHE, J)